

Phillip Wm. Lear  
Lear & Lear PLLC  
808 E South Temple Street  
Salt Lake City, UT 84102  
Telephone: (801) 538-5000  
Facsimile:(801) 538-5001  
Email: [phillip.lear@learlaw.com](mailto:phillip.lear@learlaw.com)  
Local Attorney for Linda P. Smith

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

LINDA P. SMITH,

*Plaintiff*

Case No. 1:21-cv-00047-HCN-DBP

v.

XAVIER BECERRA, in his capacity  
as the Secretary of the United States  
Department of Health and Human  
Services,

*Defendant*

PISTORINO DECLARATION IN  
SUPPORT OF MOTION FOR  
ATTORNEY'S FEES

JURY TRIAL DEMANDED

Judge Howard Nielson, Jr.  
Magistrate Judge Dustin B. Pead

## DECLARATION OF JAMES PISTORINO

I, James Pistorino, makes this stamen of my own personal knowledge and, if called upon t do so, I could competently testify to the matters herein:

1. I am a partner in the Parrish Law Firm, a graduate of Duke University School of Law, and have been a practicing lawyer involved in litigation for more than 25 years.

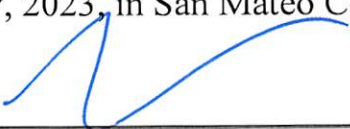
2. Attached, as Exhibit A, is a true and correct copy of the transcript of the oral argument held before the Tenth Circuit on May 17, 2022.

3. Attached, as Exhibit B are true and correct copies of the resumes/CVs of all the attorneys relevant to this fee petition.

4. Attached, as Exhibit C are true and correct copies of the relevant billing statements, including both expenses and the attorneys time charged at their usual and customary rates in their respective markets.

5. Attached, as Exhibit D, is a timeline of proceedings in this and related litigation.

Executed this 17th day of January, 2023, in San Mateo County, California.

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Mr. James Pistorino

# EXHIBIT A

## ORAL ARGUMENTS

1

1  
2  
3 UNITED STATES COURT OF APPEALS  
4 FOR THE TENTH CIRCUIT  
5 \*\*\*\*\*  
6 LINDA P. SMITH,  
7 Plaintiff-Appellant,  
8 -vs- No. 22-4012  
9 XAVIER BECERRA, in his capacity  
10 as Secretary of the United States  
11 Department of Health and Social  
12 Services,  
13 Defendant-Appellee.  
14 \*\*\*\*\*  
15  
16  
17  
18 TRANSCRIPT OF RECORDED ORAL ARGUMENTS  
19  
20  
21 THE PANEL: CHIEF JUSTICE TIMOTHY TYMKOVICH  
22 JUDGE ALLISON EID  
23 JUDGE JOEL CARSON  
24  
25

1

1 THE CHIEF JUSTICE: I'll call our last  
2 case, 22-4012, Smith vs. Becerra. And  
3 Mr. Pistorino.

4 MR. PISTORINO: Thank you, Your Honor.  
5 James Pistorino on behalf of Mrs. Smith. Nearly  
6 five years after submitting — after presenting  
7 her claim for Medicare coverage, Ms. Smith  
8 finally reached the district court, the first  
9 tribunal in the appeal process with the power to  
10 review and invalidate 1682-R. The district  
11 court erred as a matter of law when it allowed  
12 the Secretary to avoid any judicial review when  
13 it concluded that the Secretary's agreement to  
14 pay her claims afforded Ms. Smith complete  
15 relief and left the court with no power to  
16 address the rest of Ms. Smith's causes of  
17 action, including her request for injunctive  
18 relief against 1682-R.

19 The district court's two-sentence  
20 docket entry entering judgment remanding solely  
21 for payment of Ms. Smith's claims but failing to  
22 make any findings or even consider the  
23 nonmonetary relief sought ignores that  
24 Ms. Smith's other causes of action were not  
25 alternative theories for monetary recovery.

3

1 TRANSCRIPT OF ORAL ARGUMENTS, taken in the  
2 above-entitled action, from an audio recording of  
3 proceedings held on Tuesday, May 17, 2022.

4 \*\*\*\*\*  
5  
6 A P P E A R A N C E S  
7 JAMES C. PISTORINO,  
8 Attorney at Law,  
9 appearing on behalf of the  
10 plaintiff-appellant;  
11 JOSHUA KOPPEL,  
12 Attorney at Law,  
13 appearing on behalf of the  
14 defendant-appellee.  
15 \*\*\*\*\*  
16  
17  
18  
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2

1 Instead they sought separate nonmonetary relief,  
2 including an injunction.

3 JUDGE CARSON: Do you interpret the  
4 May 13th revised ruling as basically granting  
5 you a successful outcome on all your other  
6 pending claims?

7 MR. PISTORINO: When you say the  
8 May 13th revised ruling, you mean — are you  
9 referring to the document that was submitted on  
10 Friday at 4:15?

11 JUDGE CARSON: Yes.

12 MR. PISTORINO: So the first answer is  
13 no. I mean, honestly, again Ms. Smith sought —

14 JUDGE CARSON: You don't interpret  
15 that as giving you a win across the board —

16 MR. PISTORINO: No.

17 JUDGE CARSON: — on pending claims?  
18 Why not?

19 MR. PISTORINO: Again first off, again  
20 there's no injunction against the enforcement of  
21 1682, number one. There's no determination that  
22 the Secretary's process of issuing rulings  
23 without complying with notice and comment is in  
24 violation of the law. Throughout this entire  
25 case and throughout the entire really five-year

4

## ORAL ARGUMENTS

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1 period this matter has been litigated, the  
2 Secretary contends that they have the power to  
3 issue rulings in violation of 1395h, the notice  
4 and comment provision specific to the Medicare  
5 Act, and as the Secretary said below here and  
6 somewhat in the papers to this Court, the  
7 Secretary contends the district courts have no  
8 power to stop the agency from enacting illegally  
9 in that way.

10 JUDGE CARSON: So you're not going to  
11 declare victory?

12 MR. PISTORINO: No. No, I wish —  
13 frankly, I wish I could.

14 JUDGE CARSON: Honestly, we need to  
15 determine whether this is still justiciable  
16 under the mootness doctrine. What's your kind  
17 of best response that it's not moot?

18 MR. PISTORINO: Right. So again  
19 obviously we got the same papers you guys got on  
20 Friday afternoon. If I could just maybe quickly  
21 two — a few points on that. I actually thought  
22 it was quite interesting in that essentially if  
23 you were to read that document as sort of across  
24 the board, they admitted what I've been saying  
25 the entire time, that CGMs are in fact blood

5

1 glucose monitors as that term is used in the  
2 statutes.

3 JUDGE CARSON: Yeah,  
4 congratulations.

5 MR. PISTORINO: Thank you, Your Honor.  
6 So across the board admitting, for example, that  
7 the technical direction letter you saw mentioned  
8 here, that that also did not stop the conduct.  
9 Again you saw Judge Mendoza in the Olson case  
10 out of Spokane say again that didn't stop it.  
11 So through Friday, I'll say in our view, the  
12 submission they made admitted that everything  
13 they'd said before was wrong and everything we  
14 said was right and so the case as it stood  
15 before the district court certainly was not moot  
16 and you still had the power, now coming to the  
17 effect potentially Friday's letter.

18 So generally we would just respond  
19 sort of three main points. First, I know we  
20 turned in a letter, I apologize for it, late  
21 Sunday night citing the W. T. Grant case from  
22 the Supreme Court going down the voluntary  
23 cessation points and, of course, pointing out  
24 that the mere ceasing of the illegal conduct  
25 does not deprive the Court of jurisdiction to

6

1 issue an injunction is our number one, because,  
2 of course, if they just stopped it, it would  
3 allow them to continue the illegal conduct on a  
4 going forward basis just as soon as this case  
5 was resolved.

6 Next we — let me just make sure I —  
7 so I think another important aspect that we  
8 could get into, of course, is as we've been  
9 saying all along, basically in our view, you  
10 just have bad faith conduct from the get-go on  
11 the 27 — 1682-R throughout the whole process.  
12 So one aspect here is whether or not at the end  
13 of the day, and I think as Judge Mendoza said,  
14 whether or not they can be trusted with whatever  
15 they say now, and I think as Judge Mendoza said,  
16 again I know that we cited to, that he had  
17 significant concerns that whatever they say  
18 could be trusted, and that's one reason there,  
19 for example, he said no, it's not moot based on  
20 the TDL.

21 JUDGE CARSON: Well, let's just talk  
22 about this for just a second, and I don't mean  
23 to interrupt. But as far as the claims that you  
24 have that are currently ripe for a decision, you  
25 win. They agreed to that. You're not worried

7

1 that they're going to go back after they  
2 confessed error and it was remanded for you to  
3 get your damages, that they're going to on those  
4 claims try to jerk the rug out from under you  
5 and say no, we're not going to pay them, we  
6 don't — we've changed our mind, we're not  
7 confessing here, right?

8 MR. PISTORINO: I agree with you in  
9 the sense I'm not concerned that Ms. Smith will  
10 not be paid for the three claims that are in  
11 this case. But I am concerned, number one, that  
12 there's been no finding that her CGM is durable  
13 medical equipment. Because there's no — sadly,  
14 there's no cure for type 1 diabetes that she  
15 suffers from, she will have continued claims  
16 going forward. And one aspect —

17 JUDGE CARSON: Right. So let me stop  
18 you there, so — and then you have other claims  
19 that are pending that have not been ruled on by  
20 a district court.

21 MR. PISTORINO: Correct.

22 JUDGE CARSON: And you also want as  
23 part of your relief with respect to your appeal  
24 from these three denials, you want relief as to  
25 those that you have that are pending?

8

## ORAL ARGUMENTS

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1 MR. PISTORINO: No, that's not  
2 correct.  
3 JUDGE CARSON: Well, that's what your  
4 injunction would do, isn't it? If you enjoin  
5 them from enforcing it, then it basically gives  
6 you a win on your other pending claims before  
7 the district court? Because if we're not doing  
8 that, I mean if you win on everything that's  
9 properly up here, what do you have? What are we  
10 enjoining? You've already won.  
11 MR. PISTORINO: So I just want to make  
12 clear because I know there's many different  
13 claims at issue. So we have the three claims at  
14 issue in this case.  
15 JUDGE CARSON: Right.  
16 MR. PISTORINO: Three claims at issue  
17 in this case, let's focus on those for a  
18 moment.  
19 JUDGE CARSON: Right, and that's my  
20 point. I mean there's nobody in this room, is  
21 there, that thinks that those claims are still  
22 in play? You won on those.  
23 MR. PISTORINO: I think with regard to  
24 payment of those three claims, we won. But what  
25 we also asked for again was the nonmonetary

9

1 relief, right, and there's different components  
2 of that.  
3 JUDGE CARSON: Okay. But let me ask  
4 you, so your nonmonetary relief as it goes to  
5 those three claims, I mean what is it? I mean  
6 what are you getting with respect to those three  
7 claims other than payment?  
8 MR. PISTORINO: You're getting —  
9 JUDGE CARSON: You submitted them for  
10 payment. They denied it. You appealed. You  
11 won and now — but you also won an injunction.  
12 I just don't get with those three claims what's  
13 left.  
14 MR. PISTORINO: Right. So you keep on  
15 saying we won, and I agree that we won in terms  
16 of the payment, but again I have multiple causes  
17 of action with different forms of relief. All  
18 the other ones are nonmonetary.  
19 JUDGE CARSON: Okay. So tell me  
20 about — tell me how the rest of them still live  
21 after you get paid.  
22 MR. PISTORINO: Right. So one thing  
23 we asked for, for example, just the most simple  
24 one, I might say, is a declaration that  
25 Ms. Smith's CGM qualifies as durable medical

10

1 equipment under the statute, right. A  
2 declaration of that will have a real world  
3 effect in that in future claims by Ms. Smith,  
4 that would be determined and estop the Secretary  
5 from contending otherwise. We also asked — we  
6 have a cause of action saying that with regard  
7 to 1682, the Secretary did not comply with  
8 Congress' statute in 1395hh, as signed by the  
9 President, and subjected to notice and comment.  
10 And what we asked for was a  
11 determination that that particular conduct,  
12 issuing rulings without complying with notice  
13 and comment, is violative of the statute, and I  
14 wanted an injunction estopping that. And what  
15 the Secretary has contended all along is, first,  
16 we as the Secretary, I have the power to violate  
17 the laws of Congress, I can act illegally,  
18 that's what they argued below, if you look at  
19 the appendix, their motion for summary judgment.  
20 Assuming I did violate the statute, Court, you  
21 have no power to control me. You cannot stop me  
22 from acting illegally.  
23 So I think that's going to come right  
24 back to your question about what was the effect  
25 of yesterday — I'm sorry, Friday, what's the

11

1 effect of Friday. It just comes back. Have  
2 they ever disclaimed that position? No. That's  
3 the position they maintain. And again coming  
4 back to what they — or their goal, it appears  
5 to be, is to avoid judicial review of that  
6 solely for the purpose of preserving that claim.  
7 So whatever they did on Friday, right,  
8 again I know what point I have here is that we  
9 keep on calling them rulings, right, 1682-R, the  
10 ruling. It's just a letter written by somebody  
11 at the department, right. The January 17th  
12 letter is just a letter written by a guy,  
13 Patrick McConway (ph.), just a letter written by  
14 a guy, right, totally illegal, again as it's  
15 been found adjudged in the Olson case, bad  
16 faith, just flat-out bad faith. And on the  
17 basis of that, right, again, for five years,  
18 tens of thousands of claims have been denied,  
19 hundreds of thousands actually, and tens of  
20 thousands of people have been injured.  
21 And so if you just look at the conduct  
22 more recently, and candidly, I'm counsel in all  
23 of these cases —  
24 JUDGE CARSON: Right.  
25 MR. PISTORINO: Every single case is

12

1 me. Every single step that they have taken has  
2 been an effort to avoid judicial review. So  
3 when they get a guy, for example, Mr. Olson and  
4 then I win, if they could have, they would have  
5 paid all his claims to make sure that he never  
6 came back while they continued the bad faith  
7 conduct, and that's exactly what Judge Mendoza  
8 pointed to.

9 JUDGE CARSON: But your theory is that  
10 they're going to rescind the rescission and —  
11 in other words, they've thrown in the towel  
12 through this letter ruling and that your concern  
13 is that there is — as soon as we turn our  
14 backs, they're going to rescind that letter  
15 ruling and start denying claims again. I mean  
16 that's — is that the path —

17 MR. PISTORINO: So maybe I'll look at  
18 it in three ways. First, first, the whole  
19 purpose of these efforts by them is to preserve  
20 their ability to do exactly that. So your  
21 starting point would be — again just maybe more  
22 globally, normally you just look at it and say  
23 from the voluntary cessation perspective at just  
24 a high level, when someone tells me they're not  
25 going to do it, what's the reason I'm going to

13

1 trust them, right? Why would I trust them, I  
2 think that was a phrase used, whether or not  
3 their change of behavior seems genuine, right,  
4 and what my point is, across the board here,  
5 it's not that it seems genuine.

6 It's the opposite. You know it was  
7 bad faith all the way through. That got you to  
8 Friday. Now you go to the voluntary cessation  
9 principles under which, of course, the Secretary  
10 bears — I think the phrases are typically the  
11 formidable burden, the heavy burden, a stringent  
12 standard. The Secretary would bear the burden  
13 of establishing all of that. And again just  
14 coming back, for example, to this Court's case  
15 in College America, another case, two main  
16 prongs, first the voluntary —

17 JUDGE CARSON: That doesn't sound like  
18 something we can do on appeal. That sounds like  
19 it needs to be argued somewhere else either in  
20 the administrative process or maybe back at the  
21 district court.

22 MR. PISTORINO: And at the end of the  
23 day, whatever is settled, my point is just it  
24 would be the Secretary's burden to establish it  
25 and again if you look —

14

1 JUDGE CARSON: And he hasn't even  
2 tried to do it at this point, right?

3 MR. PISTORINO: Right, right. They  
4 haven't tried —

5 JUDGE CARSON: We'll find out in a few  
6 minutes, but since Friday they haven't tried  
7 to.

8 MR. PISTORINO: They haven't tried to.  
9 And again what we would say is again from the  
10 voluntary cessation, you can trust me kind of  
11 things, what you're looking for are indications,  
12 bases under which to credit their statements.  
13 So normally it's something formal like a  
14 legislature takes action and you know that once  
15 the legislature takes action, it's going to be  
16 really hard to change that, and that's my whole  
17 point here.

18 These "rulings," they're just letters.  
19 There's no process. A guy signed a letter in  
20 2017. Tens of thousands of people are injured.  
21 On Friday, I guess Ms. Brooks decided she —  
22 they didn't want to show up here like that. She  
23 just signs the letter. If this Court were to  
24 dismiss the case, or any court, there's just  
25 absolutely no reason the next day, you sign the

15

1 letter and it's not like you say, well, I know  
2 that won't happen because they're reasonable.  
3 No, you know exactly the opposite, right. So —  
4 and again the other point, again I just had some  
5 notes —

6 JUDGE CARSON: Let me joust with you  
7 for a minute about a couple things because what  
8 concerns me is there's lots of things up in the  
9 air here and a lot of them seem really  
10 speculative to me. A lot of the things you say  
11 seem to be like concerning what might happen to  
12 other people. So I want to make sure we're  
13 focused on your client and what you're doing.  
14 Because you're not taking the position that you  
15 should get an injunction to protect other  
16 people, are you? Your position is that you want  
17 to go get an injunction so they can't do this to  
18 your client going forward, is that right?

19 MR. PISTORINO: I think actually the  
20 technical answer would be both.

21 JUDGE CARSON: Okay.

22 MR. PISTORINO: Because again under  
23 this, for example, National Mining — I know I  
24 cited cases from this Court, when you're  
25 litigating, exactly as we are here, the legality

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## ORAL ARGUMENTS

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1 of the conduct, compliance with the statute,  
 2 it's not just the statute for in this case  
 3 Ms. Smith. It's for everybody. So our goal  
 4 obviously just from a high level —  
 5 JUDGE CARSON: Right.  
 6 MR. PISTORINO: — this case is about  
 7 \$5,000. No one's going to litigate the case for  
 8 \$5,000 solely. It's very important to  
 9 Ms. Smith. There are much bigger principles  
 10 that are driving it here.  
 11 JUDGE CARSON: Got it. So I'm just  
 12 thinking about the district court's remand here.  
 13 I mean obviously I guess this two-line docket  
 14 entry was followed up with a judgment.  
 15 MR. PISTORINO: No, the two-line was  
 16 the judgment.  
 17 JUDGE CARSON: It was the judgment?  
 18 MR. PISTORINO: Yes.  
 19 JUDGE CARSON: So the court entered  
 20 judgment —  
 21 MR. PISTORINO: With the two lines.  
 22 JUDGE CARSON: — in favor of you.  
 23 And so because the government, basically they  
 24 came in and confessed error?  
 25 MR. PISTORINO: The court entered —

17

1 the Secretary said in so many words —  
 2 JUDGE CARSON: Right.  
 3 MR. PISTORINO: — we'll pay your  
 4 three claims, we'll give you that money, \$5,000,  
 5 as long as the court does not address the  
 6 illegality or any of the other stuff you say,  
 7 that settlement offer rejected. The court went  
 8 with that, said, okay, I'm going to adopt the  
 9 rejected settlement offer. You say he entered  
 10 judgment for me.  
 11 He entered judgment saying I want them  
 12 to pay those three claims and everything else  
 13 I'm silent on. And I'm sorry, I'm staying over  
 14 my time.  
 15 THE CHIEF JUSTICE: We'll continue as  
 16 long as Judge Carson jousts —  
 17 JUDGE CARSON: And I won't joust too  
 18 long, but I'm just — I mean it concerns me  
 19 because now what we're talking about is what  
 20 they might do going forward. And in the face  
 21 of — which sounds speculative to me without  
 22 further denials. It concerns me that maybe this  
 23 isn't ripe for a decision because the rest of  
 24 what you want is based on what might happen in  
 25 the future.

18

1 Now, I get what you're saying, look,  
 2 they're jerking the rug out from under everybody  
 3 before, they're going to do it again, I don't  
 4 want to just be right here again arguing the  
 5 same thing to you and they give us a letter the  
 6 day before saying they're not going to do it  
 7 anymore. I get that, but that's sort of what —  
 8 I'm just struggling with the idea that maybe  
 9 we're dealing with a case where what you want is  
 10 an injunction to prevent what might happen in  
 11 the future, not that, you know, there's any  
 12 imminent threat that is going to happen.  
 13 MR. PISTORINO: So if I can — and  
 14 again I'm very conscious of my time. And very  
 15 quickly to try to address it, so first —  
 16 actually I was just sitting here thinking, at a  
 17 high level manner, it's so ridiculous, it would  
 18 be funny except for the tens of thousands of  
 19 people that have been injured, right, except for  
 20 the debts, okay, so number one —  
 21 JUDGE CARSON: Right.  
 22 MR. PISTORINO: I want to come your  
 23 point about speculative. I think that's a fair  
 24 thing, although again I know the second prong of  
 25 voluntary cessation is complete eradication of

19

1 the effect. And of course, because they've been  
 2 denying these claims for five years, tens of  
 3 thousands of people have been dissuaded from  
 4 even submitting the claims.  
 5 JUDGE CARSON: Right.  
 6 MR. PISTORINO: So again just from the  
 7 thing that got submitted at 4:15 on Friday, how  
 8 would anybody know, right? I mean was there  
 9 some big publicity campaign that they sent  
 10 emails — sent letters to everybody? No. From  
 11 the public's perspective, it's another secret  
 12 thing so they wouldn't know. So the second  
 13 prong they could never show.  
 14 In terms of speculative, again their  
 15 whole thing is have they stopped, have they  
 16 forsworn the claim so they can issue rulings  
 17 without complying with notice and comment, 1395?  
 18 No, they have not. They maintain that they  
 19 still can and that you all are completely  
 20 powerless no matter how many people they kill.  
 21 So is it speculative? Not really when that's  
 22 the power they claim, right. That's what  
 23 they're claiming as of today.  
 24 So, you know, again you talk about  
 25 gamesmanship. Hey, something came in at 4:15,

20



1 you know, two business days before their oral  
2 argument and the appeal and you just see the  
3 efforts of avoiding judicial review, so time and  
4 time again. The TDL, that came about because I  
5 had a motion for preliminary injunction pending  
6 in the Olson case, and I'd already had it  
7 pending. They thought they could knock it off  
8 with that -- this because I had already argued  
9 against the TDL, and it was obviously clearly  
10 improper. I appreciate your time. Thank you.

11 THE CHIEF JUSTICE: Are you done?

12 JUDGE CARSON: I'm finished.

13 THE CHIEF JUSTICE: Counsel, you may  
14 be seated then. Okay, let's hear from  
15 Mr. Koppel for the Department of Human Services.

16 MR. KOPPEL: Good afternoon, Your  
17 Honors. May it please the Court, I'm  
18 Josh Koppel on behalf of the United States.

19 Plaintiffs sought judicial review of  
20 Medicare's denial of three claims for payment.  
21 The Secretary confessed error and the district  
22 court properly entered judgment for plaintiff,  
23 ordering the Secretary to pay the claims.

24 JUDGE CARSON: Okay. So tell me this.  
25 What's the effect of that confession? Was it as

21

1 issue preclusion from denying this claim going  
2 forward in the future as to Smith?

3 MR. KOPPEL: I don't know that there  
4 would necessarily be collateral estoppel based  
5 on that confession of error. That would be, you  
6 know, certainly for a future court to decide.  
7 But the Secretary has in the meantime taken  
8 additional action to ensure that these claims of  
9 plaintiff and of third parties will not be  
10 denied.

11 The Secretary in November 2020 issued  
12 a proposed rule and in December 2021 issued the  
13 final rule making clear that adjunctive and  
14 therapeutic continuous glucose monitors and  
15 insulin pumps that perform the functions of a  
16 CGM are durable medical equipment that are to be  
17 covered by Medicare. The Secretary -- I'm  
18 sorry, the CMS then issued --

19 JUDGE CARSON: Prospectively.

20 MR. KOPPEL: That was prospectively.  
21 And then CMS took action to apply that rule  
22 retroactively as well, first with the technical  
23 direction letter. That was the quickest way CMS  
24 could address the issue, although it left gaps,  
25 for example, Medicare Part C. And so then CMS

23

1 represented to me by your opposing counsel was  
2 it's these three claims, we'll pay them, but we  
3 want nothing to do with any other issue that's  
4 on the table?

5 MR. KOPPEL: The effect of the  
6 confession in the district court was that these  
7 three claims should have been paid and the  
8 Secretary will pay them. Now, the Secretary  
9 went beyond that and explained that the reason  
10 those claims should have covered in the first  
11 instance is that plaintiff obtained supplies for  
12 an insulin pump that could also perform the  
13 functions of a continuous glucose monitor, and  
14 insulin pumps have been considered durable  
15 medical equipment covered by Medicare since the  
16 mid-1990s.

17 The Medicare Appeals Council, they  
18 failed to consider that and they got this wrong.  
19 So all of Ms. Smith's future claims related to  
20 her insulin pump should be paid.

21 JUDGE CARSON: All right. So --

22 MR. KOPPEL: Now even if she didn't --

23 JUDGE CARSON: So is it the  
24 government's position that they would be -- I  
25 mean through some sort of collateral estoppel or

22

1 worked toward this ruling that came out last  
2 week, and I want to be clear, this is not a  
3 letter signed by some guy. This is a ruling  
4 signed by the administrator of the Centers for  
5 Medicare and Medicaid Services.

6 This is a formal statement of  
7 coverage. And so last Friday CMS issued this  
8 CMS ruling, formally rescinding the 2017 CMS  
9 ruling, and making clear that for pending and  
10 future claims, regardless of the date of  
11 service, all continuous glucose monitors and  
12 insulin pumps that perform the functions of a  
13 continuous glucose monitor are durable medical  
14 equipment and will be covered by Medicare. That  
15 moots this case.

16 JUDGE CARSON: Can that be rescinded  
17 tomorrow?

18 MR. KOPPEL: CMS administrative  
19 rulings are not that easily rescinded, I'll say  
20 that.

21 JUDGE CARSON: They could, though --

22 MR. KOPPEL: In theory, it could be  
23 rescinded, but this Court -- and with regards to  
24 voluntary cessation, the exception to mootness,  
25 we haven't had a chance to really brief this

24

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1 because the issue just arose. But this Court  
2 has repeatedly held that the withdrawal or  
3 alteration of administrative policies can moot  
4 an attack on those policies and that the mere  
5 possibility that an agency might rescind  
6 amendments to its actions does not align moot  
7 controversy.

8 And I encourage the Court to take a  
9 look at Denver Bible Church vs. Polis which was  
10 issued this year, Prison Legal News vs. Federal  
11 Bureau of Prisons in 2019 and Rio Grande Silvery  
12 Minnow vs. Bureau of Reclamation in 2010. All  
13 of those cases involved the rescission or  
14 alteration of an administrative policy, and this  
15 Court held that that rescission or alteration  
16 mooted the attack on the policy.

17 The government is accorded a  
18 presumption of good faith and unless there is  
19 some evidence that the government is going to  
20 rescind the rescission, the Court has held that  
21 the rescission or alteration moots the claim.

22 JUDGE CARSON: There is a history here  
23 of steadfast opposition to their statutory  
24 theory. We can't ignore that, can we?

25 MR. KOPPEL: Well, to — I want to

25

1. monitors as durable medical equipment. So  
2 there's no indication that CMS is going to pull  
3 the rug out. Second, even aside from mootness,  
4 so even if the voluntary cessation exception  
5 does apply, there's at least a question — or at  
6 least two questions. First, one of rightness.  
7 There's no — we don't know for sure what CMS  
8 will do with any particular claim until CMS has  
9 actually done that. And so a judicial ruling on  
10 a future claim is not yet right.

11 And second, there's a jurisdictional  
12 statutory authority issue, which is that a court  
13 doesn't have statutory authority, it doesn't  
14 have jurisdiction to consider a Medicare claim  
15 until it has been presented to the agency.  
16 There's no claim, other than the three here,  
17 that have already been paid and judgment has  
18 been entered and they've already been paid by  
19 CMS. No other claim has yet been presented to  
20 the agency and certainly has not yet reached the  
21 final agency decision.

22 And so the district court simply  
23 doesn't have jurisdiction to consider those  
24 future claims.

25 JUDGE CARSON: Aren't all those future

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1 answer that with — in two ways. First, I don't  
2 think that there is a history of bad faith.  
3 Even after some district courts have ruled that  
4 continuous glucose monitors are durable medical  
5 equipment, CMS did continue to apply the 2017  
6 CMS ruling, as it was entitled to do, with  
7 regard to other Medicare beneficiaries or other  
8 claims.

9 Of course, if there had been a Court  
10 of Appeals ruling on that issue, CMS would have  
11 had a different policy within that circuit. If  
12 there had been a Supreme Court ruling, of course  
13 that would have been definitive. But CMS was  
14 entitled to continue to apply that ruling and  
15 continue to test the ruling in court.

16 In November 2020 CMS reconsidered the  
17 issue, you know, in part due to, of course,  
18 these repeated holdings by district courts. And  
19 the continuous stream of actions since then has  
20 been in one direction, so issuing the proposed  
21 rule, issuing the final rule, issuing the TDL,  
22 issuing this new CMS ruling.

23 Every action CMS has taken has  
24 actually been to move toward covering for all  
25 dates of service these continuous glucose

26

1 claims going to be paid under the May 13th  
2 ruling?

3 MR. KOPPEL: They absolutely should  
4 be, and that is just an additional reason that  
5 there's no — there's no cause for the district  
6 court to issue a decision on the validity of the  
7 2017 CMS ruling. That would be an advisory  
8 opinion.

9 And you know, plaintiff has — shifts  
10 tactics here. Instead of simply seeking a  
11 decision on the 2017 CMS ruling, which would be  
12 an advisory opinion, now plaintiff seeks an  
13 advisory opinion on whether CMS rulings  
14 generally can be issued without notice and  
15 comment. That's certainly an advisory opinion.  
16 It depends —

17 JUDGE CARSON: The plaintiff — are  
18 you taking the position that claimants still  
19 need to appeal their claims up to the MAC for  
20 all these pending cases?

21 MR. KOPPEL: If there is a future  
22 claim for coverage of a continuous glucose  
23 monitor that is denied, that does need to be  
24 appealed to the Medicare Appeals Council. After  
25 that, CMS issues a final — or HHS issues a

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1 final agency decision. Only after that does the  
2 statute permit the district court to exercise  
3 jurisdiction and provide judicial review.

4 JUDGE CARSON: I guess my question is  
5 different then. Are the administrators, the  
6 ALJs and the MAC still going to be relying on  
7 1682-R —

8 MR. KOPPEL: No.

9 JUDGE CARSON: — or is that gone?

10 MR. KOPPEL: That is gone. The 1682-R  
11 has been rescinded.

12 JUDGE CARSON: So a claim that's  
13 pending before the administrator, the ALJ or the  
14 MAC basically should be adjudicated immediately  
15 in favor of the claimant?

16 MR. KOPPEL: Yes.

17 JUDGE CARSON: Are there any  
18 exceptions to that? Will this be all glucose  
19 monitoring claimants or do — I might have heard  
20 you say that the monitor needed to be connected  
21 to another durable medical device. Did I  
22 misunderstand that?

23 MR. KOPPEL: No, the continuous  
24 glucose monitor itself is the durable medical  
25 equipment. So there are —

29

1 JUDGE CARSON: Standing alone, those  
2 get covered now under this new policy?

3 MR. KOPPEL: Yes. Of course, provided  
4 that the beneficiary actually has diabetes, you  
5 know, and that it's diagnosed and they have to  
6 be to using a dedicated continuous glucose  
7 monitor, not a phone, like an iPhone, because  
8 that has a — the primary purpose of that is not  
9 medical. But the mine run of cases, generally  
10 speaking, what we're talking about here,  
11 continuous glucose monitors starting immediately  
12 are considered durable medical equipment. Those  
13 claims will be paid. That's regardless of the  
14 date service. And even if a claim has been —  
15 has already been denied, if that claim is still  
16 pending, you know, it's on appeal to an ALJ, the  
17 latest CMS ruling issued by the administrator  
18 makes clear that that claim is to be reopened  
19 and paid.

20 JUDGE CARSON: And I guess this lawyer  
21 would know his way around the agency process,  
22 but I also have a question on the voluntary  
23 cessation. Why doesn't that still need to be  
24 resolved somehow, either by this panel or by a  
25 district court somewhere? I don't know that

30

1 we're in a position to really evaluate that  
2 claim yet.

3 MR. KOPPEL: Yeah. So because  
4 voluntary cessation goes to mootness and  
5 mootness is a jurisdictional issue, I believe  
6 that this Court has an independent duty to make  
7 a decision on the mootness question itself. You  
8 know, some of those cases that I cited, Denver  
9 Bible Church, Prison Legal News, Rio Grande, at  
10 least some of those I know that rescission and  
11 alteration of the administrative policy under  
12 attack was issued while the case was on appeal  
13 and this Court went ahead and made the decision  
14 on mootness itself.

15 And you know, it is true that the  
16 court has stated generally the party arguing in  
17 favor of mootness bears the burden to show that  
18 the challenged action won't be repeated, but the  
19 court has also made clear in those cases that  
20 where the challenged action was in an  
21 administrative policy that has been rescinded or  
22 altered, the burden is not quite so burdensome.  
23 And in fact, the burden may even shift to the  
24 plaintiff in those cases to show that there is  
25 some cause to think that the government will

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1 pull the rug out.

2 And certainly, you know, there's no  
3 cause to think that these are formal rulings,  
4 and keep in mind that the CMS ruling applies to  
5 a closed set of cases because for dates of  
6 service February 28th, 2022 going forward, those  
7 cases, those claims are governed by the 2021  
8 final ruling, which went through notice and  
9 comment, you know, a very formal rule-making  
10 process. That really cannot easily be reversed  
11 absent another notice and comment process.

12 So the CMS ruling applies to a closed  
13 set of cases that every day is diminishing, and  
14 there is no indication that the CMS  
15 administrator for any reason would want to all  
16 of a sudden switch policy with regard to that  
17 closed and diminishing set of cases. And of  
18 course, you know, the CMS administrator cannot  
19 reverse the 2021 final rule, you know, so  
20 easily. So the idea that the CMS ruling will be  
21 reversed again as soon as this Court issues its  
22 decision is quite implausible.

23 JUDGE CARSON: Let me ask you a  
24 question. Are you familiar with the plaintiffs'  
25 district court actions that are pending?

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1 MR. KOPPEL: Some of them. I'm not as  
2 familiar with the ones —  
3 JUDGE CARSON: Okay.  
4 MR. KOPPEL: With all of them.  
5 JUDGE CARSON: Do you know as — why  
6 hasn't the government confessed error in those  
7 cases? Why didn't — when they determined that  
8 the three claims in this case should be paid  
9 because the interpretation was wrong, why didn't  
10 they confess error in those cases too?  
11 MR. KOPPEL: I'm not — I'm sorry, I  
12 can't speak to those.  
13 JUDGE CARSON: Okay.  
14 MR. KOPPEL: I'm not familiar enough  
15 with them.  
16 JUDGE CARSON: Let me tell you why I'm  
17 asking you.  
18 MR. KOPPEL: Yeah.  
19 JUDGE CARSON: Because doesn't the  
20 fact that they would confess error here and not  
21 confess error in those cases suggest that it was  
22 gamesmanship to confess error here and get this  
23 case off the books?  
24 MR. KOPPEL: So, you know, one reason  
25 is that the Secretary confessed error here

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1 immediately because plaintiff was using not just  
2 a stand-alone continuous glucose monitor but an  
3 insulin pump that also performs the functions of  
4 a continuous glucose monitor, and that's really  
5 a different category. Insulin pumps have been  
6 durable medical equipment again since the  
7 mid-1990s. So that's why the Secretary was able  
8 to confess error here, you know, so quickly.  
9 I do expect that with this new CMS  
10 ruling, you know, the position may change in  
11 those other courts. I'm not sure —  
12 JUDGE CARSON: I don't understand why  
13 that's different from counsel's other case. As  
14 I understand it, it's the same plaintiff, same  
15 equipment, different payments. These just  
16 happen to have had a decision and could come up  
17 on appeal. Those are still pending with no  
18 ruling. And if they're the same and you confess  
19 as to three and you don't confess as to the  
20 others, I mean doesn't that suggest you're  
21 trying to evade review?  
22 MR. KOPPEL: So it's certainly not the  
23 same plaintiff, I want to be clear about that.  
24 Smith — this is Smith's only action.  
25 JUDGE CARSON: Okay.

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1 MR. KOPPEL: The other claims are  
2 other plaintiffs. Those other cases also  
3 involve ancillary issues. So, for example,  
4 there's a case in the District of Columbia where  
5 plaintiffs were trying to seek payment of claims  
6 that had not been appealed and where the time to  
7 appeal had run. And so there are questions of  
8 whether the district court had jurisdiction over  
9 those.  
10 I believe that in Olson, some of the  
11 issues relate not to whether the claims should  
12 have been paid but whether — what the  
13 appropriate relief is, whether injunctive relief  
14 should be issued, attorneys' fees, that kind of  
15 thing. So I don't — I don't want to speak to  
16 those other cases. I'm not familiar enough with  
17 them to speak to them, but I'm not sure it's  
18 true that the Secretary continues to not pay —  
19 you know, continues to take the position that  
20 continuous glucose monitors are not durable  
21 medical equipment.  
22 JUDGE CARSON: Okay.  
23 MR. KOPPEL: And certainly this latest  
24 CMS ruling I believe should make clear that, you  
25 know, continuous glucose monitors are durable

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1 medical equipment going forward, you know, from  
2 here on, regardless of the date of service, even  
3 for past dates of service.  
4 JUDGE CARSON: Before you sit down, I  
5 had a question on the equitable relief. It  
6 seems to me that the cases that I've reviewed  
7 strongly suggest that 405(g) is a permissible  
8 vehicle for some forms of equitable and  
9 declaratory relief, and I'm not sure you really  
10 denied that or opposed that in your papers. But  
11 do you agree that a district court could order  
12 in an appropriate case some form of equitable  
13 relief, an injunction or a declaratory judgment?  
14 MR. KOPPEL: Califano vs. Yamasaki  
15 holds that some form of equitable relief is  
16 available. I'm not sure — and we took the  
17 position, although we continue to take the  
18 position that setting aside or enjoining a rule  
19 to apply — such that the injunction would  
20 require the Secretary to pay future claims that  
21 haven't yet been presented —  
22 JUDGE CARSON: Well, that's a merits  
23 question.  
24 MR. KOPPEL: Right.  
25 JUDGE CARSON: I'm talking about the

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1 broader judicial power question.

2 MR. KOPPEL: There is some set of  
3 equitable remedies that are available. You  
4 know, *Califano vs. Yamasaki* addressed equitable  
5 powers to ensure the pending — that the  
6 pending — the status quo remains pending  
7 resolution of litigation or to protect the  
8 interests of the absent class members. So  
9 certainly those kinds of equitable powers are  
10 available. You know, here —

11 JUDGE CARSON: I think that's a recent  
12 DC circuit case, *Parzakansky* (ph.), that also  
13 suggests equitable relief was proper in some  
14 circumstances.

15 MR. KOPPEL: Exactly. But as that  
16 case makes clear, and I think that's a very —  
17 quite analogous case. Just because *Califano*  
18 held that equitable remedies are available, it  
19 doesn't mean — it didn't determine when they're  
20 available. And where the plaintiff, and this is  
21 what *Parzakansky* held, where the plaintiff seeks  
22 equitable relief to decide future claims that  
23 haven't been yet presented to the agency and  
24 haven't yet reached a final agency decision,  
25 those equitable remedies are not available.

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1 applies a CMS ruling to a claim properly and the  
2 Secretary confess — you know, contests or  
3 continues to contest the claim before the  
4 district court, the district court can consider  
5 the validity of the CMS ruling and if it's  
6 invalid, that would be a basis to reverse and  
7 remand.

8 The question that the district court  
9 didn't get to, and I don't think this Court  
10 needs to, is whether the district court can then  
11 issue an injunction saying this CMS ruling also  
12 shouldn't be applied in future cases because  
13 that decides claims that haven't yet been  
14 presented to the agency.

15 But in terms of deciding for purposes  
16 of a present live claim for Medicare coverage  
17 whether a CMS ruling is properly issued,  
18 absolutely the circuit court can do that, and  
19 that allows the Court of Appeals to rule on the  
20 issue, potentially the Supreme Court, and we  
21 certainly don't take issue with that.

22 In this case, however, not only is the  
23 issue moot, but for all the reasons we've  
24 explained, even if the issue were not moot, the  
25 decision of the district court should be

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1 JUDGE CARSON: But why wouldn't here a  
2 declaration that the Secretary's interpretation  
3 of the statute is wrong, why wouldn't that —  
4 that just seems like a pretty garden variety  
5 remedy that, you know, actually to the extent it  
6 applies to, you know, thousands of other  
7 claimants would be a good thing because it would  
8 resolve the legal authority of the agency. You  
9 know, maybe the district court issues a  
10 declaratory judgment that's appealed to a  
11 circuit, you know, or whatever. But that just  
12 seems like kind of something that happens every  
13 day in the district courts.

14 MR. KOPPEL: So in the appropriate  
15 case, a court can rule on the validity of a CMS  
16 ruling. So I mean there's a number of reasons  
17 that this district court couldn't and shouldn't  
18 going forward, you know, mootness, the 2017 CMS  
19 ruling has been rescinded, the plaintiff's claim  
20 wasn't properly decided under the 2017 CMS  
21 ruling because that ruling didn't apply to  
22 insulin pumps. The appeals council erred in  
23 applying the 2017 CMS ruling to plaintiff's  
24 claim.

25 But in a case where, you know, HHS

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1 affirmed. Thank you.

2 THE CHIEF JUSTICE: Counsel, we  
3 understand both your arguments. Thank you very  
4 much for clarifying the situation for us.  
5 You're excused. Your case shall be submitted,  
6 and the Court will be in recess until 9 o'clock  
7 tomorrow morning, I believe.

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# EXHIBIT B

**JAMES CHARLES PISTORINO**

224 Lexington Dr.  
Menlo Park, CA 94025  
(650) 400-0043

**EXPERIENCE:**

- September 2015 – present      **PARTNER:** Parrish Law Office: Litigation/Appellate practice.
- March 2011 – September 2015      **PARTNER.** Perkins Coie, LLP. Intellectual Property litigation involving patents and copyrights and breach of contract actions in federal courts and arbitrations.
- 2004-2011, 1996-2004      **PARTNER/ASSOCIATE.** Howrey Simon Arnold & White (formerly Arnold, White & Durkee). Involved in full range of intellectual property representation including patent, copyright, trademark, and trade secret litigation, patent and trademark prosecution, motion and appellate practice, contracts, and legal research. Special emphasis on computer software related issues.
- March – May 2001      **ASSISTANT DISTRICT ATTORNEY.** Dallas County District Attorney's Office. Participated in the Lawyer's On Loan program prosecuting misdemeanor cases. Prosecuted thirteen (13) jury trials and five (5) trials before the Court.
- May - August, 1995      **LAW CLERK.** United States International Trade Commission, Office of Unfair Import Investigations. Legal research and memoranda related to patent infringement litigation.

**REPRESENTATIVE MATTERS:**

- Driessen v. Sony Music Entertainment, et al.* (Utah)  
Defend Sony Music, Best Buy, Target, FYE in patent case involving music cards
- Clouding v. Amazon, Inc., et al.* (Del)  
Defend Amazon, Rackspace, Dropbox in cases related to cloud computing
- Round Rock Research LLC v. AsusTek Computer Inc., et al.* (Del)  
*AsusTek Computer Inc. et al. v. Round Rock Research LLC* (ND Cal)  
Defend AsusTek in cases involving 16 patents related to computer components
- Technology Innovations Associates, LLC v. Google, Inc.* (Del)  
Defend Google in patent case involving user interfaces
- Mount Hamilton Partners LLC v. Google, Inc.* (ND Cal)  
Defend Google in patent case related to coupons
- FuzzySharp Technologies Inc. v. Intel Corp.* (ND Cal)  
Defend Intel in patent case related to 3D graphics
- Princeton Digital Imaging Corp. v. Amazon.com/Netflix* (Del) (ongoing)  
Represent Amazon/Netflix in patent case involving JPEG
- Techsavies LLC v. WDFB Marketing, Inc.* (ND Cal) (2010-2011)

Pistorino Resume

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Represent TechSavies in breach of contract/copyright matter  
*Scientific Plastic Products, Inc. v. Merck & Co., Inc., et al.* (SD Cal) (2009)  
Defend Merck in patent case related to flash chromatography  
*CalCars, Inc. v. California Cars Initiative, Inc.* (CD Cal) (2008)  
Defend CCI in trademark infringement dispute  
*Anticancer v. Merck & Co., Inc. et al.* (SD Cal) (2007-10)  
Defend Merck in five patent case related to green fluorescent protein  
*Visto Corp. v. Seven Networks, Inc.* (ED Tex) (2005-2007)  
Defend Seven in multiple cases related to email synchronization  
*Streck Laboratories v. Beckman Coulter et al* (Neb) (1999-2000)  
Represent Streck in patent case related to blood substitutes

**ADMISSIONS:**

State Bars of California and Texas, United States Patent & Trademark Office,, numerous  
Courts of Appeals, including the Supreme Court

**EDUCATION:**

**Duke University School of Law**, Durham, NC.

J.D. May 1996

**Duke University**, Durham, NC.

B.S. with Distinction in Computer Science May 1993

**PUBLICATIONS/MEMBERSHIPS:**

SF Bay Area IP Inn of Court

President (2012 –2014), Vice-President (2010-12), Treasurer (2008-10)

University of California Hastings Schools of Law (Spring 2013-Spring 2016t)

Adjunct professor, Patent Litigation

Santa Clara University (Summer 2012)

Adjunct professor, Patent Litigation Strategies and Tactics

James C. Pistorino, *2012 Trends in Patent Case Filings*, BNA, (February 2013)

James C. Pistorino, *2011 Trends in Patent Case Filings*, BNA, (March 2012)

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James C. Pistorino, *Another Way to Attack Written Description in Re-Exam*,  
IPLaw360 (August 2010)

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Chapter on summary judgment, portions of chapter on equitable defenses.

James C. Pistorino, *Recent Developments in Patent Law*,  
6 TEX. INTELL. PROP. LAW. J. 355 (1998).

Numerous speeches to ACC and other groups.





The Downey Mansion  
808 East South Temple Street  
Salt Lake City, Utah 84102  
801-538-5000  
Fax: 801-538-5001  
[www.learlaw.com](http://www.learlaw.com)

**Phillip Wm. Lear**  
**Attorney**



**Emeritus Attorney  
Of Counsel**

[phillip.lear@learlaw.com](mailto:phillip.lear@learlaw.com)  
801-231-1428

**PRACTICE FOCUS**

Natural resources and public lands law with emphasis on acquisition, exploration, permitting and production of oil, gas, and mining properties; oil and gas conservation matters; complex title examinations; administrative hearings and appeals; natural resources litigation and appeals; mergers and acquisitions; mineral financing; water rights; natural resources law on Indian reservations; and expert witness for mineral and public lands-related matters.

**EDUCATION**

University of Utah (J.D., 1975; H.B.A., magna cum laude, 1969)  
Phi Beta Kappa, Phi Alpha Theta  
Graduate, Honors College

**COURT ADMISSIONS**

United States Supreme Court  
United States Court of Appeals, Ninth and Tenth Circuits  
United States Court of Federal Claims  
United States District Courts, Districts of Utah and Colorado, District of Columbia  
Supreme Courts of Utah and Colorado Ute Indian Tribal Court, Uintah and Ouray Reservation (Utah)

**PROFESSIONAL MEMBERSHIPS AND ACTIVITIES**

American Bar Association  
Utah, Colorado State Bars  
Salt Lake County Bar Association  
Rocky Mountain Mineral Law Foundation  
President (2002-2003) Vice President-President Elect (2001-2002);  
Secretary (1997-1998) Member-at-Large, Executive Committee (1994-1996)  
Trustee (1984-1987, 1989-1991, 1994-1997, 1999-present)  
Program Chair, 35th Annual Rocky Mountain Mineral Law Institute (1989)  
American Association of Professional Landmen / Chair, Special Institutes Committee (1990-1996)  
Utah Association of Professional Landmen, President (1997-1998)  
Utah Petroleum Association / Petroleum Association of Wyoming

**OTHER PROFESSIONAL EXPERIENCE**

Founder and Senior Partner, Lear & Lear PLLC (2001-2016)  
Partner, Snell & Wilmer, Salt Lake City, Utah (1993-2001)  
Shareholder, Van Cott, Bagley, Cornwall and McCarthy, Salt Lake City, Utah (1979-1993)  
Associate, Pruitt & Gushee, Salt Lake City, Utah (1975-1979)  
Lieutenant, United States Navy (1969-1972)



## REPRESENTATIVE PUBLICATIONS

*Use of Technology in the Preparation of an Opinion and Calculations Workshop*, ADVANCED MINERAL TITLE EXAMINATION, PAPER 24 (Rocky Mt. Min. L. Fdn. 2014).

*Mineral Title Examinations: The Whos, Whats, Whens, Wheres, and Whys of Mineral Title Assurance*, MINERAL TITLE EXAMINATION IV, PAPER 1 (Rocky Mt. Min. L. Fdn. 2007).

*Split Estates and Severed Minerals: Rights of Access and Surface Use after the Divorce (and Other Leasehold Access-Related Problems*, 50 ROCKY MT. MIN. L. INST. 10-1 (2004) [co-authored].

*Rights of Access and Permitting for Coalbed Methane*, Society of Professional Engineers Applied Technology Workshop; Coal Bed Gas Resources of Utah, SPE Paper No. 87084 (2003).

*Coal and Coalbed Methane Development Conflicts Revisited: The Oil and Gas Perspective*, PUBLIC LAND LAW, REGULATION, AND MANAGEMENT, Paper 10 (Rocky Mt. Min. L. Fdn. 2003).

*The Ethical Landman: All you Need to Know about Ethics You Learned in Sunday School*, ETHICS & PROF. RESPONSIBILITY (Rocky Mt. Min. L. Fdn. 2000).

*Access to Indian Land and Title Records: Freedom of Information, Privacy, and Related Issues*, NAT. RESOURCES DVPT. & ENVTL REG. IN INDIAN COUNTRY, Paper 4-1 (Rocky Mt. Min. L. Fdn. 1999) [co-authored].

*Utah Oil and Gas Conservation Law & Practice*, 1998 UTAH L. REV. 89 (1998); ONSHORE POOLING & UNITIZATION Paper 5C (Rocky Mtn. Min. L. Fdn. 1997).

*Cooperative Multiple Mineral Development Agreements: A Nuts and Bolts Approach*, 43 ROCKY MTN. MIN. L. INST. 3-1 (1997).

*Modern Oil & Gas Conservation Practice: And You Thought the Law of Capture was Dead?*, 41 ROCKY MTN. MIN. L. INST. 17-1 (1995) [co-authored].

*Exhaustion of Tribal Court Remedies and Federal Questions: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277 (1995) [co-authored].

*Division Order Issues in the 1990's: State Policing of an Unresponsive Industry*, OIL & GAS ROYALTIES ON NON-FEDERAL LANDS, Paper 6 (Rocky Mt. Min. L. Fdn. 1993).

*Multiple Mineral Development Conflicts in Coalbed Methane Operations*, COALBED GAS DEVELOPMENT: EAST AND WEST, Paper 4A (Rocky Mt. Min. L. Fdn. 1992).

*Accretion, Reliction, Erosion, and Avulsion: A Study in Riparian and Littoral Title Problems*, 29 PUB. LAND & RESOURCES L. DIG. 11 (1992); 11 J. ENERGY, NAT. RESOURCES & ENVTL. L. 265 (1991).

*Conflicts in Simultaneous Mineral Operation Revisited: Armageddon One Day Closer*, THE LANDMAN [Part: I Jan/Feb]; [Part 2 Mar/Apr]; [Part 3 May/June] (American Assoc. of Petroleum Landmen 1992).

*Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement*, 37 ROCKY MT. MIN. L. INST. 3-1 (1991).

*Conservation Principles and Federal Onshore Pooling and Unitization: An Overview*, FEDERAL ONSHORE POOLING AND UNITIZATION 11, Paper I (Rocky Mt. Min. L. Fdn. 1990).

*First Purchaser Suspense Accounts*, 33 ROCKY MT. MIN. L. INST. 17-1 (1988).

*Chapter XXIII Conflicts in the Development of Other Minerals*, 2 LAW OF FEDERAL OIL AND GAS LEASES (Rocky Mt. Min. L. Fdn., Rel. 2008).

*Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations?*, 28 ROCKY MT. MIN. L. INST. 79 (1983).

*Examination of Title to Fee Lands*, MINERAL TITLE EXAMINATION 11, Paper 2 (Rocky Mt. Min. L. Fdn., 1982); Chapter 92, *Examination of Title to Fee Lands*, 3 AMERICAN LAW OF MINING (Rocky Mt. Min. L. Fdn., Rel. 20-7/85).

*Lurking Title Problems: Snares for the Unsuspecting Federal Oil and Gas Lease Title Examiner*, 25 ROCKY MT. MIN. L. INST. 18-1 (1980).

*Utah's Short Statutes of Limitations for Tax Titles: The Continuing Specter of Lyman v. National Mortgage Bond Corp. - A Need for Remedial Legislation*, BYU L. REV. 457 (1976).

*Tax Sales and Tax Titles in Utah: Windfalls and Windstorms*, 1 J. CONTEMP. L. 299 (1975).

## PRESENTATIONS AND SEMINARS

"Use of Technology in the Preparation of an Opinion and Calculations Workshop," Advanced Mineral Title Examination, Rocky Mountain Mineral Law Foundation (Denver, Colorado, January 2014).

Mineral Title Examinations: The Whos, Whats, Whens, Wheres, and Whys of Mineral Title Assurance, Mineral Title Examination IV (Denver, Colorado, September 2007).

Split Estates and Severed Minerals: Rights Of Access and Surface Use after the Divorce (and Other Leasehold Access-Related Problems, Rocky Mountain Mineral Law Foundation (Vail, Colorado, July 2004).

Coal and Coalbed Methane Development Conflicts Revisited: The Oil and Gas Perspective, Rocky Mountain Mineral Law Foundation (Santa Clara, New Mexico, May 2003).

Rights of Access and Permitting for Coalbed Methane, Society of Professional Engineers Applied Technology Workshop, Coalbed Gas Resources of Utah (Alta, Utah, October 2003).

Post-Production Costs, 30<sup>th</sup> Annual Institute of the National Association of Division Order Analysts (Salt Lake City, September 2003); Utah Association of Professional Landmen (Salt Lake City, 2003); Rocky Mountain Association of Petroleum Accountants (Salt Lake City, 2003).

The Ethical Landman: All you Need to Know About Ethics You Learned in Sunday School, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, December 2000), AAPL Annual Meeting (Salt Lake City, June 2001).

Access to Indian Land and Title Records: Freedom of Information, Privacy, and Related Issues, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, May 1999).

Cooperative Multiple Mineral Development Agreements: A Nuts and Bolts Approach, 43rd Annual Rocky Mountain Mineral Law Institute (Portland, July 1997).

Utah Oil and Gas Conservation Law & Practice, Onshore Pooling & Unitization, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, January 1997).

Modern Oil & Gas Conservation Practice: And You Thought the Law of Capture was Dead?, 41st Annual Rocky Mountain Mineral Law Foundation (Sun Valley, June 1995).

Symposium: Natural Resources Development and Tribal Rights, North Dakota Law Review, University of North Dakota School of Law (Grand Forks, April 1995).

Ethical Considerations for Landmen, CLE sponsored by the Utah Association of Petroleum & Mining Landmen (Salt Lake City, February 1995).

Multiple Mineral Development Conflicts between Oil and Gas and Trona in Southwestern Wyoming, Annual Meeting of the Rocky Mountain Oil & Gas Association (Denver, September 1994).

Symposium: Royalty and Division Order Issues in the Rocky Mountain States; 20th Annual Institute of the National Association of Division Order Analysts (San Diego, September 1993).

Division Order Issues in the 1990's: State Policing of an Unresponsive Industry, Oil & Gas Royalties on Non-Federal Lands, Special Institute of the Rocky Mountain Mineral Law Foundation (Santa Fe, April 1993).

Symposium: Indian Mineral Development Act, 1992 Field Symposium of the Utah Geological Association (Vernal, Utah, May 1992).

Multiple Mineral Development Conflicts in Coalbed Methane Operations, Coalbed Gas Development: East and West Special Institute of the Rocky Mountain Mineral Law Foundation (Santa Fe, March 1992).

Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement, 37th Annual Rocky Mountain Mineral Law Institute (Monterey, July 1991).

Accretion, Reliction, Erosion, and Avulsion: A Study in Riparian and Littoral Title Problems, 18<sup>th</sup> Annual Institute of the National Association of Division Order Analysts (Washington, D.C., September 1991).

Conflicts in Simultaneous Mineral Operation Revisited: Armageddon One Day Closer, 37th International Conference and Annual Meeting of the American Association of Petroleum Landmen (Denver, June 1991).

Symposium: Northern Rocky Mountains Workshop--Trusts: Concepts and Problems for Division Order Analysts; Statutory Pooling Orders; Descent and Distribution: Rudiments of Intestacy Law for Division Order Analysts; Oil and Gas Royalty Provisions: A Review for Division Order Analysts; 17th Annual Institute of the National Association of Division Order Analysts (Phoenix, August 1990).

Public and Indian Land Issues in Commercial Transactions, Environmental & Natural Resources Issues in Commercial Transactions, CLE of the Utah State Bar (Salt Lake City, April 1990).

Conservation Principles and Federal Onshore Pooling and Unitization: An Over-view, Federal Onshore Pooling and Unitization II, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, January 1990).

First Purchaser Suspense Accounts, 33rd Rocky Mountain Mineral Law Institute (Vail, Colorado, July 1987); Houston Association of Division Order Analysts (Houston, May 1988); National Association of Division Order Analysts (Denver, September 1989).

Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations? (Vail, Colorado, July 1982).

Examination of Title to Fee Lands, Rocky Mountain Mineral Law Foundation (Tucson, April 1982).

Lurking Title Problems: Snares for the Unsuspecting Federal Oil and Gas Lease Title Examiner (Seattle, July 1979).

**Debra M. Parrish**

788 Washington Road  
Pittsburgh, PA 15228  
412-561-6250

1050 Conn. Ave., 10<sup>th</sup> Fl.  
Washington, DC 20036  
202-772-4254

[debbie@dparrishlaw.com](mailto:debbie@dparrishlaw.com)  
412-561-6253 (fax)  
412-337-2718 (cell)

**PROFESSIONAL EXPERIENCE**

- **Parrish Law Offices, 1999-Present**  
Representing and counseling health care providers, research institutions, journals and life science companies in the areas of health care law (including reimbursement for innovative technology), science law (compliance with research regulations, investigations and research misconduct), intellectual property (including litigation, licensing, contracts and employee agreements).
- **Titus & McConomy LLP, elected partner in 1996, 1994-1999**  
Involved in complex litigation, science law (including research misconduct and research regulations, compliance and investigations including criminal investigations of life science companies), intellectual property (patent prosecution and litigation) and health care law.
- **Office of Research Integrity, Office of the General Counsel, Department of Health & Human Services, 1992-1994**  
Drafted rules and regulations governing scientific misconduct and research fraud; reviewed, investigated and prosecuted allegations of scientific misconduct.
- **Fulbright & Jaworski, Washington, DC, Associate, 1989-1992**  
Represented national health care clients on medical staff issues, Medicare/Medicaid reimbursement, and litigation involving health care providers; litigated intellectual property cases.

**EDUCATION**

- **J.D., Duke University School of Law**
- **B.S.E., Biomedical Engineering, Duke University**
- **M.P.H., Johns Hopkins Bloomberg School of Public Health (expected 2021)**

**BAR MEMBERSHIPS AND ASSOCIATIONS**

- **United States Court of Appeals for the Second Circuit**
- **United States Court of Appeals for the Ninth Circuit**
- **United States Court of Appeals for the Eleventh Circuit**

- **American Health Lawyers Association**
- **Society for Research Administrators**
- **National Association of College and University Attorneys**
- **American Bar Association, 2017 winner of the *Pro Bono Publico* Award**
- **Pennsylvania, North Carolina, District of Columbia and Florida Bar**
- **Patent Bar**
- **Allegheny County Bar Association**
- **Public Responsibility in Medicine and Research**
- **Council of Science Editors**

## **ACTIVITIES**

- **Council of Science Editors, Editorial Policy Committee, 2004-Present**
- **International Business Ethics Institute, Director and Consultant, 1994-present**
- **Institutional Review Board, University of Pittsburgh Medical Center, 1994-1999**
- **Adjunct Professor, University of Pittsburgh Medical Center, Spring 2016**

## **SELECTED SPEECHES**

### **National Presentations**

- **“Research Misconduct: A Year in Review,” Society of Research Administrators International, San Francisco, CA, October 2019 and October 2020.**
- **“Patents and IP Protection: Why They Matter to Us,” Society of Research Administrators International, San Francisco, CA, October 2019.**
- **“Advocacy for Medicare Coverage for Diabetes,” American Association of Diabetes Educators, Baltimore, MD, August 2018.**
- **“DMEPOS Update,” American Health Lawyers Association, Baltimore, MD, March 2017.**
- **“Master Class: Billing Compliance,” MAGI’s Clinical Research Conference, Las Vegas, NV, October 23, 2016.**
- **“Research Misconduct: A Year in Review,” Society of Research Administrators, Annual Meeting, San Antonio, TX, October 26, 2016.**
- **“The Journals’ Role in Research Misconduct Cases,” Society of Research Administrators, Annual Meeting, San Antonio, TX, October 25, 2016.**
- **“Patient Access to Medications,” panel discussion, Corporate AACE Partnership (CAP), Boston, MA, October 14, 2016.**

- **“Standardization of Processes for Handling Research Misconduct,”** National Academy of Sciences Journal Summit, Washington, DC, March 17, 2016.
- **“DMEPOS Update,”** American Health Lawyers Association, Baltimore, MD, March 2016.
- **“Patient Access to Medications,”** American Association of Clinical Endocrinologist, Boston, MA, Oct. 14, 2016.
- **“Top Ten Issues for Research Universities,”** moderator, National Association of College and University Attorneys Annual Meeting, Chicago, IL, June 2013.

#### Local and Regional Presentations

- **“Reimbursement Considerations for Clinical Diagnostic Tests,”** Pennsylvania Life Sciences & Association of University Technology Managers, Philadelphia, PA, October 2018.
- **“Research Misconduct and Clinical Trials” and “Research Misconduct and Graduate Students,”** Society for Research Administrators, Minneapolis, MN, April 28 and 29, 2014. • **“Reimbursement with a Global Fair Panel,”** Pennsylvania Bio (BioTech 2010), Philadelphia, PA, October 2010.
- **“Successfully Taking Your Claims Through the Medicare Appeals Process,”** Pennsylvania Bio (BioTech 2010), Philadelphia, PA, October 2010.
- **“Reimbursement for New Medical Technology,”** Carnegie Mellon University, Pittsburgh, PA, April 2010.

#### SELECTED ARTICLES

- **“Federal Agencies Can Do More To Ensure Correction of the Literature,”** Accountability in Research, Vo. 25, issue 6, Sept. 2018.
- **“The Physician Payment Sunshine Act,”** Ethical Editor, May 2014.
- **“Research Misconduct in Clinical Trials and Clinical Research,”** Ethical Editor, July 2012.
- **“White Paper on Promoting Integrity in Scientific Journal Publications,”** Council of Science Editors, March 2012.

- **“Expressions of Concern and Their Uses,”** by Bridget Noonan and Debra M. Parrish, Learned Publishing, July 2008 Vol. 21, No. 3.
- **“Research Misconduct and Plagiarism,”** by Debra M. Parrish, Journal of College and University Law, January 2007, Vol. 33, No. 1.
- **White Paper on Promoting Integrity in Scientific Journal Publications,”** Council of Science Editors, Editorial Policy Committee (2006).



# EXHIBIT C

**Parrish Law Offices**788 Washington Road  
Pittsburgh, PA 15228

Date

4/2/2018

**Invoice**

Invoice #

5679

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
11/17/2017	Follow up with Lambert and Council re L. Smith remanded case	1	Prof Svcs @ \$525/hr	525.00
11/20/2017	Revision of reconsideration for L. Smith	0.25	Prof Svcs @ \$525/hr	131.25
12/19/2017	Postage L. Smith		Postage	6.65
2/8/2018	Linda Smith appeals	1.25	Prof Svcs @ \$525/hr	656.25
3/19/2018	Hearing for Linda Smith with Judge Woodyard	0.75	Prof Svcs @ \$525/hr	393.75
3/29/2018	Telephone conference L. Smith; review of ABN and email for her to send to Medtronic; email response to Linda Ostrow	0.5	Prof Svcs @ \$525/hr	262.50
3/22/2018	Postage L. Smith			26.80
<b>Total</b>				\$2,002.20
<b>Balance Due</b>				\$2,002.20

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date
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6/1/2018
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**Invoice**

Invoice #
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5740
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Bill To
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Linda Smith
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Client/Matter No.
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Matter Line 1
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Service ...	Description	Qty	Item	Amount
4/22/2018	postage			21.70
5/15/2018	Linda Smith emails re supplies	0.25	Prof Svcs @ \$525/hr	131.25
<b>Total</b>				\$152.95
<b>Balance Due</b>				\$152.95

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

7/2/2018

**Invoice**

Invoice #

5784

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
6/8/2018	ALJ request and emails re same; telephone conference re mom in Colorado	0.75	Prof srvc @ \$550/hr	412.50
6/18/2018	Emails Linda Smith re appeals	0.33333	Prof srvc @ \$550/hr	183.33
6/28/2018	Requested LS participation in Judge Sardinas hearing (18-01); called OMHA about DOS on NOH and s/w Sonia (x2).	0.16667	Prof Srvc @ \$350/hr	58.33
6/21/2018	postage			6.70

**Total**

\$660.86

**Balance Due**

\$660.86

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

8/1/2018

**Invoice**

Invoice #

5817

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
7/23/2018	Linda Smith appeals	0.75	Prof srvc @ \$515/hr	386.25
7/24/2018	Linda Smith postage			6.70
<b>Total</b>				<b>\$392.95</b>
<b>Balance Due</b>				<b>\$392.95</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date
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9/4/2018
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**Invoice**

Invoice #
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5837
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Bill To
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Linda Smith
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Client/Matter No.
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Matter Line 1
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Service ...	Description	Qty	Item	Amount
8/20/2018	Telephone conference and Emails re extension.	0.25	Prof srvc @ \$550/hr	137.50
<b>Total</b>				\$137.50
<b>Balance Due</b>				\$137.50



**Parrish Law Offices**788 Washington Road  
Pittsburgh, PA 15228

Date

12/3/2018

**Invoice**

Invoice #

5930

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
11/20/2018	PHB for combined case.	0.5	Prof srvc @ \$550/hr	275.00
11/21/2018	attn to settlement agreement	0.5	Prof srvc @ \$515/hr	257.50
11/23/2018	Postage (Linda Smith)			6.70
<b>Total</b>				\$539.20
<b>Balance Due</b>				\$539.20

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

1/2/2019

**Invoice**

Invoice #

5991

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
12/11/2018	hearing with ALJ, prep for same, t/c Linda Smith	2.4	Prof srvcs @ \$515/hr	1,236.00
12/18/2019	revise/review memo re: CMS1682R and Medtronic devices	3.6	Prof srvcs @ \$515/hr	1,854.00
<b>Total</b>				\$3,090.00
<b>Balance Due</b>				\$3,090.00

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date
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3/1/2019
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**Invoice**

Invoice #
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6023
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Bill To
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Linda Smith
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Client/Matter No.
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Matter Line 1
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Service ...	Description	Qty	Item	Amount
2/19/2019	attended hearing with ALJ, t/c Linda Smith re: same, t/c Debbie Parrish re: same	2.2	Prof Svcs @ \$525/hr	1,155.00
<b>Total</b>				\$1,155.00
<b>Balance Due</b>				\$1,155.00

**Parrish Law Offices**788 Washington Road  
Pittsburgh, PA 15228

Date

4/1/2021

**Invoice**

Invoice #

6668

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
3/1/2021	research re complaint	2.4	Prof svcs @ \$550/hr	1,320.00
3/12/2021	t/c Phillip Lear re: local counsel, attention to filing complaint	1.2	Prof svcs @ \$550/hr	660.00
3/20/2021	revise/review memo re: case status, revise/review complaint documents	2.4	Prof svcs @ \$550/hr	1,320.00
3/27/2021	revise/review complaint	2.6	Prof svcs @ \$550/hr	1,430.00
3/28/2021	revise/review complaint	0.6	Prof svcs @ \$550/hr	330.00
3/30/2021	revise/review memo re: filing	1.1	Prof svcs @ \$550/hr	605.00
<b>Total</b>				<b>\$5,665.00</b>
<b>Balance Due</b>				<b>\$5,665.00</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

5/3/2021

**Invoice**

Invoice #

6693

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
4/1/2021	revise/review complaint	0.8	Prof srvc @ \$550/hr	440.00
4/6/2021	revise/review summons	1.1	Prof srvc @ \$550/hr	605.00
4/19/2021	attn to service	0.4	Prof srvc @ \$550/hr	220.00
4/26/2021	attn to service	0.3	Prof srvc @ \$550/hr	165.00
<b>Total</b>				<b>\$1,430.00</b>
<b>Balance Due</b>				<b>\$1,430.00</b>

**Parrish Law Offices**788 Washington Road  
Pittsburgh, PA 15228

Date

7/1/2021

**Invoice**

Invoice #

6752

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
6/7/2021	reviewing pleadings, I/c Lear re: same, research re: same	1.2	Prof srvc @ \$550/hr	660.00
6/8/2021	revise/review memo re: filing	0.9	Prof srvc @ \$550/hr	495.00
6/15/2021	attn to magistrate consent form	0.9	Prof srvc @ \$550/hr	495.00
6/17/2021	revise/review memo re: production/schedule	0.8	Prof srvc @ \$550/hr	440.00
6/18/2021	revise/review proposed schedule	2.3	Prof srvc @ \$550/hr	1,265.00
6/21/2021	attn to proposed schedule	0.9	Prof srvc @ \$550/hr	495.00
6/22/2021	revise/review memo re: case status/strategy	1.4	Prof srvc @ \$550/hr	770.00
6/24/2021	revise/review response to court order	2.6	Prof srvc @ \$550/hr	1,430.00
6/28/2021	reviewing pleadings, research re: same, revise/review memo re: same, reviewing production, revise/review objection	3.6	Prof srvc @ \$550/hr	1,980.00
<b>Total</b>				<b>\$8,030.00</b>
<b>Balance Due</b>				<b>\$8,030.00</b>



**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

8/2/2021

**Invoice**

Invoice #

6776

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
7/12/2021	t/c Linda, revise/review memo re: case status, additional claims	1.2	Prof srvcs @ \$550/hr	660.00
7/22/2021	revise/review memo re: case status	0.4	Prof srvcs @ \$550/hr	220.00
<b>Total</b>				<b>\$880.00</b>
<b>Balance Due</b>				<b>\$880.00</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

9/1/2021

**Invoice**

Invoice #

6784

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
8/2/2021	revise/review memo re: additional denials	0.9	Prof srvc @ \$550/hr	495.00
8/9/2021	t/c Phillip Lear - prep for hearing	1.4	Prof srvc @ \$550/hr	770.00
8/10/2021	prep for and attend case management conference	2.7	Prof srvc @ \$550/hr	1,485.00
8/11/2021	attn to appeals, revise/review memo re: same	0.4	Prof srvc @ \$550/hr	220.00
8/25/2021	revise/review motion re: answer	2.7	Prof srvc @ \$550/hr	1,485.00
8/27/2021	revise/review motion re: answer	2.6	Prof srvc @ \$550/hr	1,430.00
8/31/2021	revise/review reply re: answer	2.1	Prof srvc @ \$550/hr	1,155.00
<b>Total</b>				<b>\$7,040.00</b>
<b>Balance Due</b>				<b>\$7,040.00</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

10/1/2021

**Invoice**

Invoice #

6825

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
9/1/2021	revise/review reply re: scheduling	2.1	Prof srvc @ \$550/hr	1,155.00
9/2/2021	revise/review reply re: scheduling	3.4	Prof srvc @ \$550/hr	1,870.00
9/5/2021	revise/review MSJ re: CMS 1682-R, revise/review MSJ re: collateral estoppel	3.6	Prof srvc @ \$550/hr	1,980.00
9/6/2021	revise/review MSJ re: CMS 1682-R, revise/review MSJ re: collateral estoppel	6.5	Prof srvc @ \$550/hr	3,575.00
9/7/2021	revise/review MSJ re: CMS 1682-R, revise/review MSJ re: collateral estoppel	11.4	Prof srvc @ \$550/hr	6,270.00
9/10/2021	revise/review Rule 11 motion	2.4	Prof srvc @ \$550/hr	1,320.00
9/13/2021	revise/review Rule 11 motion	2.1	Prof srvc @ \$550/hr	1,155.00
9/14/2021	revise/review Rule 11 motion	2.3	Prof srvc @ \$550/hr	1,265.00
9/21/2021	reviewing opposition to motions for summary judgement, research re: same	1.4	Prof srvc @ \$550/hr	770.00
9/22/2021	revise/review reply re: summary judgements	3.7	Prof srvc @ \$550/hr	2,035.00
9/23/2021	revise/review reply re: summary judgements	4.1	Prof srvc @ \$550/hr	2,255.00
9/24/2021	revise/review reply re: summary judgements	5.2	Prof srvc @ \$550/hr	2,860.00
9/28/2021	reviewing court orders, revise/review memo re: same, t/c Phil Lear re: same	1.1	Prof srvc @ \$550/hr	605.00
			<b>Total</b>	<b>\$27,115.00</b>
			<b>Balance Due</b>	<b>\$27,115.00</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

11/1/2021

**Invoice**

Invoice #

6844

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
10/3/2021	revise/review reply re: collateral estoppel/CMS 1682	3.7	Prof srvc @ \$550/hr	2,035.00
10/4/2021	revise/review reply re: collateral estoppel/CMS 1682	6.4	Prof srvc @ \$550/hr	3,520.00
10/4/2021	Revision of papers.	1.5	Prof Srvc @ \$575/hr	862.50
10/5/2021	Edits to filing.	0.75	Prof Srvc @ \$575/hr	431.25
10/5/2021	revise/review reply re: collateral estoppel/CMS 1682	6.1	Prof srvc @ \$550/hr	3,355.00
10/18/2021	attn to revise/review filing regarding scheduling	3.4	Prof srvc @ \$550/hr	1,870.00
10/26/2021	revise/review opposition to cross - motion re: CMS 1682-R	3.7	Prof srvc @ \$550/hr	2,035.00
<b>Total</b>				<b>\$14,108.75</b>
<b>Balance Due</b>				<b>\$14,108.75</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date

2/1/2022

**Invoice**

Invoice #

6920

Bill To

Linda Smith

Client/Matter No.

Matter Line 1

Service ...	Description	Qty	Item	Amount
1/4/2022	revise/review motion for status, t/c opposing counsel	1.5	Prof Svcs @ \$575/hr	862.50
1/5/2022	revise/review motion for status	1.1	Prof Svcs @ \$575/hr	632.50
1/7/2022	revise/review memos re: status conference	0.5	Prof Svcs @ \$575/hr	287.50
1/8/2022	reviewing opp to motion for status conference	0.8	Prof Svcs @ \$575/hr	460.00
1/16/2022	t/c plaintiffs in all cases re: global settlement	1.5	Prof Svcs @ \$575/hr	862.50
1/18/2022	conf with plaintiffs in all cases re: settlement	0.5	Prof Svcs @ \$575/hr	287.50
1/27/2022	t/c Stanley re: motion to alter/amend, revise/review same	6.2	Prof Svcs @ \$575/hr	3,565.00
1/28/2022	revise/review motion to alter/amend	2.4	Prof Svcs @ \$575/hr	1,380.00
1/31/2022	revise/review motion to alter/amend, t/c Stanley re: same	5.4	Prof Svcs @ \$575/hr	3,105.00
<b>Total</b>				<b>\$11,442.50</b>
<b>Balance Due</b>				<b>\$11,442.50</b>

**Parrish Law Offices**

788 Washington Road  
Pittsburgh, PA 15228

Date
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3/1/2022
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**Invoice**

Invoice #
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6950
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Bill To
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Linda Smith
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Client/Matter No.
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Matter Line 1
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Service ...	Description	Qty	Item	Amount
2/3/2022	attn to ALJ appeal, revise/review motion to alter/amcnd	4.6	Prof Svcs @ \$575/hr	2,645.00
2/4/2022	revise/review motion to alter/amcnd	2.4	Prof Svcs @ \$575/hr	1,380.00
2/8/2022	reviewing denial of motion to alter/amend	1.1	Prof Svcs @ \$575/hr	632.50
2/21/2022	attn to notice of appeal	1.4	Prof Svcs @ \$575/hr	805.00
2/23/2022	attention to appeal filing	0.8	Prof Svcs @ \$575/hr	460.00
2/24/2022	attention to appeal filing	1.1	Prof Svcs @ \$575/hr	632.50
<b>Total</b>				<b>\$6,555.00</b>
<b>Balance Due</b>				<b>\$6,555.00</b>



The Downey Mansion  
 808 East South Temple Street  
 Salt Lake City, Utah 84102  
 801-538-5000  
 Fax: 801-538-5001  
 www.learlaw.com  
 Tax ID: 87-0687015

*Please Pay from this Invoice*

Linda Pond Smith  
 James Pistorino  
 Parrish Law Office  
 224 Lexington Drive  
 Menlo Park CA 94025

Page: 1  
 December 21, 2022  
 Account No: 1490-001  
 Invoice No: 38843

v. Xavier Becerra, as Acting Sec. Dept. of Health  
 Pro Bono plus Expenses

**LEGAL SERVICES RENDERED THROUGH 12/21/2022**

			Rate	Hours	
03/26/2021	PWL	Prepare Motion for Admission Pro Hac Vice and proposed order and transmit to J. Pistorino.	480.00	0.80	384.00
04/01/2021	PWL	Revise complaint and transmit to J. Pistorino; upload revised Civil Cover Sheet, Motion Pro Hac Vice, and Complaint; telephone conference with J. Pistorino re complaint.	480.00	2.50	1,200.00
04/02/2021	PWL	Assemble pleadings and transmit Civil Cover Sheet and Complaint to court for case number assignment; telephone conferences with J. Pistorino.	480.00	1.00	480.00
04/05/2021	PWL	Transmit Civil Cover Sheet and Complaint to court clerk for case number assignment; upload and file Civil Cover Sheet, Complaint, and Motion for Admission Pro Hac Vice; telephone conferences with J. Pistorino re same.	480.00	1.50	720.00
04/06/2021	PWL	Prepare summonses for Becerra, M. Garland, and A. Martinez and file same; download court-signed summonses and copy of Complaint and Civil Cover Sheet for service upon same; serve process by certified mail.	480.00	1.40	672.00
04/23/2021	PWL	Track Becerra service of summons and confirm same.	480.00	0.10	48.00
04/26/2021	PWL	Prepare Motion for Admission Pro Hac Vice and proposed order and transmit to J. Pistorino.	480.00	0.80	384.00
08/09/2021	PWL	Zoom conference with J. Pistorino in preparation for tomorrow's court hearing.	480.00	0.90	432.00
08/10/2021	PWL	Zoom court hearing before Judge Pead re motion for order directing filing of Answer and certified admin record.	480.00	0.90	432.00



Linda Pond Smith  
v. Xavier Becerra, as Acting Sec. Dept. of Health

Page: 2  
December 21, 2022  
Account No: 1490-001  
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			Rate	Hours	
08/27/2021	PWL	Prepare Motion to Amend Scheduling Order and file same and proposed order; telephone and email correspondence with J. Pistorino.	480.00	1.20	576.00
10/05/2021	PWL	Finalize and file Plaintiff's Reply to Motion for Summary Judgement and to Vacate; finalize and file Plaintiff's Reply to Motion for Summary Judgment on Collateral Estoppel.	480.00	2.20	1,056.00
10/26/2021	PWL	Prepare Plaintiff's Opposition to Cross-Motion and file same.	480.00	0.60	288.00
01/31/2022	PWL	Read court rules re requirement, if any, to contact the court prior to seeking a hearing on a motion to amend or alter judgement and report findings to J. Pistorino.	480.00	0.70	336.00
02/04/2022	PWL	Read and revise Smith's Motion to Alter and Amend Judgment and return to J. Pistorino with comments.	480.00	0.70	336.00
03/04/2022	PWL	Prepare Unopposed Motion to Expedite Appeal and Entry of Appearance and Designation of Interested Persons, transmit to J. Pistorino for comment; transmit Application of Admission to J. Pistorino.	480.00	1.70	816.00
03/07/2022	PWL	Telephone conference with J. Pistorino; revise Entry of Appearance and Unopposed Motion to Expedite Appeal and file same; serve opposing counsel via email; forward 10 <sup>th</sup> Circuit order granting motion to J. Pistorino.	480.00	1.30	624.00
03/10/2022	PWL	Prepare Unopposed Motion to Stay Briefing on Attorneys Fees, proposed order, and docketing statement; file motion and order with Utah District Court; file docketing statement with Tenth Circuit; serve documents via email on opposing counsel; telephone conference with Utah District Court re filing.	480.00	1.70	816.00
03/11/2022	PWL	Register with Counsel Press for filing paper copies of required filings.	480.00	0.20	96.00
03/14/2022	PWL	Prepare opening appellate brief; discuss comments with J. Pistorino; prepare and file Unopposed motion to extend date for filing appeal; transmit order granting same to J. Pistorino.	480.00	1.10	528.00
03/15/2022	PWL	Prepare opening appellate brief and discuss comments with J. Pistorino; upload volumes 1 and 2 of appendix to brief; file opening brief and Appendices I and II; forward court's filing confirmation to J. Pistorino.	480.00	1.30	624.00
03/18/2022	PWL	File Corrected Appellant's Opening Brief and Appendices Vol. I and II; transmit court filing confirmations to J. Pistorino.	480.00	0.40	192.00

*Costs may not include everything incurred to 12/21/2022*

Linda Pond Smith  
v. Xavier Becerra, as Acting Sec. Dept. of Health

Page: 3  
December 21, 2022  
Account No: 1490-001  
Invoice No: 35669

*Total Attorney Services* **23.00 11,040.00**

**TOTAL LEGAL SERVICES** **23.00 11,040.00**

**TIMEKEEPER SUMMARY**

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Phillip Wm. Lear	23.00	\$480.00	\$11,040.00

**EXPENSES THROUGH 12/21/2022**

04/06/2021	Postage	24.15
04/21/2021	Filing Fee – Federal District Court - Complaint	402.00
04/21/2021	Filing Fee – Federal District Court – Pro Hac Vice Admission Fees	250.00
<b>TOTAL EXPENSES</b>		<b>676.15</b>

**TOTAL SERVICES AND COSTS THIS INVOICE** **11,716.15**

*Costs may not include everything incurred to 12/21/2022*

# EXHIBIT D

## PROCEEDINGS IN OTHER CASES

A timeline summarizing events/cases may assist the Court:

<b>Date</b>	<b>District Court and Other Activity</b>	<b>Activity on Mrs. Smith's claims</b>
April 29, 2016	H.H.S. Civil Remedies Division holds that the Secretary's position does not pass the "reasonableness standard." <i>See</i> DAB No. CR4596 (2016). 2016 WL 2851236	
May 19, 2016	<i>Finigan</i> court calls Secretary's position "head scratching." <i>Finigan v. Burwell</i> , 189 F.Supp.3d 201, 2017, n. 6 (D. Mass).	
October 26, 2017	<i>Whitcomb</i> court calls Secretary's position "unreasonable", "arbitrary and capricious." <i>Whitcomb v. Hargan</i> , Case No. 17-cv-14, Dkt. #19 at 12, 14 (E D. Wisc. Octo. 26, 2017).	
January 29, 2018	<i>Bloom</i> court: "no evidence supports the MAC's conclusion that CGM is not 'primarily and customarily used to serve a medical purpose.'" <i>Bloom v. Azar</i> , 2018 WL 583111 at *10 (D. Vermont, January 29, 2018)	
April 5, 2018	<i>Lewis</i> court: "The Food and Drug Administration, the National Institutes of Health and multiple professional medical societies such as the American Diabetes Association and the American Medical Association deem CGM	

	<p>primarily and customarily to serve a medical purpose as a medical device”, “Council’s decision that CGM devices are not primarily and customarily used to serve a medical purpose constituted legal error and was not support by substantial evidence.” <i>Lewis v. Azar</i>, 308 F.Supp.3d 574, 578-9 (D. Mass 2018).</p>	
June 12, 2018	<p><i>Whitcomb</i> court: “no reasonable basis for arguing that continuous glucose monitors are not primarily and customarily used to serve a medical purpose; “demonstrates the unreasonableness of the Secretary’s position.” Fees awarded. <i>Whitcomb v. Azar</i>, Case No. 17-cv-14, Dkt. #34 at 4, 6 (E.D. Wisc. June 12, 2018).</p>	
June 15, 2018	<p>By this date, more than 40 ALJs had rejected the Secretary’s position more than 55 times. <i>See</i> <a href="https://dparrishlaw.com/parrish-law-offices-wins-significatn-victory-for-cgm-users/">https://dparrishlaw.com/parrish-law-offices-wins-significatn-victory-for-cgm-users/</a></p>	
January 16, 2019	<p><i>Bloom</i> court: “no reasonable person would be satisfied by the Sectary’s position that CGMs are not primarily and customarily used to serve a medical purpose.”; fees award (precise amount not decided). <i>Bloom v. Azar</i>, Case No. 16-cv-121, Dkt. #80 at 10 (D. Vermont Jan. 16, 2019).</p>	

March 30, 2019	<i>Lewis</i> court: “breadth of decisions contrary to the Secretary’s position demonstrates a ‘string of losses’”; fees awarded. <i>Lewis v. Azar</i> , 370 F.Supp.3d 267, 273 (D. Mass. 2019)	
April 9, 2019		ALJ Mark Win issues two decisions denying Mrs. Smith’s claims on the grounds that a CGM is not “primarily and customarily used to serve a medical purpose” as dictated by CMS-1682-R. App.322-31.
September 22, 2020	<i>Zieroth</i> court: “the Secretary’s interpretation ... is not reasonable” <i>Zieroth v. Azar</i> , 2020 WL 5642614 at *4 (N.D. Cal. Sep. 22, 2020).	
December 3, 2020	<i>Zieroth</i> court: “the Secretary’s position both as set forth in CMS-1682-R and reiterated in the course of the instant litigation, was not reasonable.”; fees awarded. <i>Zieroth v. Azar</i> , 2020 WL 7075629 at *2 (N.D. Cal. Dec. 3, 2020).	
February 23, 2021	<i>Olsen</i> court: “No evidence supports the Appeals Council’s conclusion that a CGM is not ‘primarily and customarily used to serve a medical purpose.’” <i>Olsen v. Cochran</i> , 2021 WL 711469 at *3 (E.D. Wash. Feb. 23, 2021)	

February 26, 2021		MAC issues decision denying Mrs. Smith's claims on the grounds that a CGM is not "primarily and customarily used to serve a medical purpose" as dictated by CMS-1682-R. App.313-21.
April 20, 2021	<i>Olsen</i> court: "Plaintiff seeks market-value attorney fees under Section 2412(b), arguing that Defendant's position in this case was in bad faith. This Court agrees."; "Defendant's defense was 'groundless.'"; "While Defendant's position was not foreclosed by bunding precedent the Court determines that it was 'so obviously wrong as to be frivolous.'"; "Altogether, Defendant's conduct meets the 'high threshold' for an award of and-faith fees." <i>Olsen v. Becerra</i> , 2021 WL 3683360 (E.D. Wash. Apr. 20, 2021).	
October 26, 2021		Noridian denies Mrs. Smith's request for redetermination of the denial of her claim for coverage of CGM supplies provided on July 14, 2021, based on CMS-1682-R and its contention that a CGM is not "primarily and customarily used to



		serve a medical purpose.” App.287.
December 17, 2021		The Qualified Independent Contractor (QIC) denied Mrs. Smith’s request for reconsideration on the grounds that CMS-1682 barred coverage because a CGM is not “primarily and customarily used to serve a medical purpose”, as dictated by CMS-1682-R. App.286-91.

With regard to the Olsen’ Court’s “bad faith” finding, Mrs. Smith’s research indicates that this is only the eleventh “bad faith” finding against the government in more than a decade out of more than two million cases.